UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
Service Oil, Inc.,	)	**Docket No. CWA-08-2005-0010**
	)	
Respondent	)	

ORDER GRANTING COMPLAINANT'S MOTION TO AMEND COMPLAINT

I. Background

The Complaint in this matter was filed on April 26, 2005 by the United States Environmental Protection Agency (EPA) Region 8 under Section 309 of the Clean Water Act (CWA). It alleges in Count 1 that Respondent failed to obtain, on or before the date it commenced construction activities at its facility, a North Dakota Pollutant Discharge Elimination System (NDPDES) permit authorizing storm water discharges from its facility, in violation of Sections 301(a) and 402(p) of the CWA and the implementing regulations at 40 C.F.R Section 122.26©. The Complaint alleges in Count 2 that after Respondent obtained the permit, it failed to conduct storm water inspections at the frequency required by the permit, and/or to maintain inspection records on-site. The penalty proposed in the Complaint for the two alleged violations is $80,000.

Respondent filed an Answer, admitting that it failed to obtain a permit and failed to conduct storm water inspections at the required frequency and maintain inspection records on-site. On November 23, 2005, after the parties failed to reach a resolution of this case in Alternative Dispute Resolution and after the prehearing exchange was completed, Complainant filed a Motion for Accelerated Decision on Liability and Penalties. In response, by Order dated March 7, 2006, Accelerated decision was *granted* as to liability on Count 2, but *denied* as to liability on Count 1, and as to the penalty. In regard to the denial of accelerated decision as to liability on Count 1, the Order explained that the statutory authority for bringing the Complaint, Section 309(g) of the CWA, provides that EPA may assess a penalty where it finds a violation of Section 301, a violation of any condition or limitation in a permit issued under Section 402 or 404, or a violation of Sections 302, 306, 307, 308, 318, or 405 of the CWA. Count 1 of the Complaint filed on April 26, 2005 did not allege a violation of these latter sections of the CWA, and did not allege that Respondent had violated a permit condition or limitation in a permit

issued under Section 402.[1] Moreover, Section 301(a), provides, "[e]xcept as in compliance with [certain sections of the CWA requiring a permit], the discharge of any pollutant by any person shall be unlawful," requires a showing of an actual "discharge," which Complainant, through undisputed facts, had not shown had occurred in its Motion for Accelerated Decision. The Order states, "[i]t may be that some provision listed in Section 309(g) of the CWA, other than Section 301, may provide the statutory basis for an administrative enforcement action for failure to apply for a stormwater permit as required by 40 C.F.R.
§ 122.26©, " but "Complainant . . .has not cited to any such provision," and "[a]ccordingly, it is concluded that under the Complaint as written, Complainant must establish that a discharge occurred during the relevant period." Therefore, accelerated decision was denied as to Count 1 on the basis that Complainant failed to establish that no genuine issues of material fact exist as to whether there was an actual discharge from Respondent's facility.

The Accelerated Decision Order also referenced another regulatory provision which is relevant to the allegations in the Complaint. The Complaint alleges that Respondent violated 40 C.F.R. Section 122.26©, which requires dischargers of stormwater to apply for a permit, and which in turn refers to permit application requirements of 40 C.F.R. Section 122.21. The Order pointed out that regulations at Section 122.21 make clear that the term "dischargers of stormwater" in Section 122.26© applies to those persons who have not yet discharged stormwater.

On March 13, 2006, Complainant filed a Motion to Amend Penalty Complaint and Notice of Opportunity for Hearing (Motion to Amend), accompanied by a Motion for Leave to File the Motion to Amend (Motion for Leave) and an Amended Penalty Complaint And Notice of Opportunity for Hearing (Amended Complaint). Complainant seeks to amend the Complaint to include Section 308 of the CWA and 40 C.F.R. Section 122.21 as additional bases for liability for Count 1. On April 3, Respondent filed a Brief in Opposition to Complainant's Motion for Leave to File Motion to Amend Penalty Complaint (Opposition), and on April 6, Complainant filed a Reply thereto.

II. Arguments of the Parties

In support of its Motion to Amend, Complainant points out that Section 308(a) of the CWA requires owners and operators of point sources to provide information as EPA may reasonably require to carry out, *inter alia*, Section 402 of the CWA. Complainant refers to an EPA guidance document, entitled "2000 Storm Water Enforcement Strategy Update," dated January 18, 2000, which states, in pertinent part, that a permit application is considered information required to carry out Section 402, and that a facility that failed to apply for a permit is automatically in violation of Section 308. Complainant points out that 40 C.F.R. § 122.21

[1] Section 402(p) sets forth the authorization for the EPA Administrator to establish regulations setting forth the permit application requirements for stormwater discharges.

requires any person who discharges or proposes to discharge pollutants (such as stormwater) to submit an application for a permit. Complainant argues that the failure to apply for a permit violates not only Sections 301 and 402 of the CWA, and 40 C.F.R. § 122.26©, but also Section 308 of the CWA and 40 C.F.R. § 122.21.

Complainant asserts that the granting of the Motion for Leave and Motion to Amend will not unduly prejudice Respondent or unduly delay the hearing, as the nucleus of operative facts upon which the Complaint relies will not be changed, there is no additional evidence required to establish a violation of failure to obtain a permit, and Respondent admits the violation. Complainant argues that allowing the amendment corrects harmless error, will not impact Respondent's defenses or the scope of its hearing preparation, and ensures that all of the appropriate bases as to Count 1 will be before this Tribunal at the hearing.[2]

In its Opposition, Respondent argues that it will be prejudiced if leave to file the motion to amend is granted. Respondent maintains that Complainant has not and will not be able to establish that an actual discharge occurred, and that an amendment on the eve of trial would strip Respondent of its defense to liability and the penalty as to Count 1, and will require Respondent to prepare new defenses. Respondent asserts that Complainant did not adequately explain its delay in submitting the Motion for Leave since the original Complaint was filed, that Complainant was aware of all legal theories it could assert, and that the only reason for delay is its failure to prevail on its motion for accelerated decision on Count 1. Respondent argues that the longer the unexplained delay, the less that is required of the nonmoving party to show prejudice, citing *Block v. First Blood Associates*, 988 F.2d 344, 350 (2nd Cir. 1993). Respondent states that the parties have engaged in extensive discovery and filed many motions on the original claims, and thus it has expended significant attorney fee costs.

Respondent argues that the amendment is not simply "tweaking" an existing claim but is asserting an entirely new and different claim. Respondent argues that an amendment at this late date will deprive Respondent of opportunity to seek dismissal of the new claim by accelerated decision. Yet, Respondent also argues that the new claim is unnecessary, because even if a failure to apply for a permit could be a violation of Section 308, "the fact that Respondent did not get a permit when it was supposed to is so totally beyond dispute that there can be no good faith reason to argue about it," that "[t]he only issue in this case is the penalty," and that the proposed amendment "adds nothing to this case on that issue." Opposition at 8.

Respondent asserts that the hearing would need to be rescheduled to allow time for Complainant to file its motion to amend and for Respondent's response thereto, and, if the Motion to Amend is granted, then Respondent will have 20 days from service of the Amended Complaint to file its answer.

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[2] Complainant states that Respondent opposes the Motion for Leave, but does not state whether Respondent opposes the Motion to Amend, as required by the Prehearing Order (at 6). This oversight is harmless, as it can be assumed that the opposition applies to both motions.

Respondent contends that the proposed amendment is futile because the argument that failure to apply for a permit violates Section 308 of the CWA is wholly without support. Section 308 does not refer to permits, and the interpretation in the EPA guidance document referenced by Complainant is "clearly at odds with the plain and unambiguous language of Section 308" and should not be relied on. Opposition at 6. Respondent asserts that Section 308 contemplates that information must be supplied upon request from EPA, and that the application for a permit does not require a request from EPA.

Respondent contends that Complainant's proposal to add a citation to 40 C.F.R. § 122.21 is also futile, because Section 122.21 requires that EPA prove an actual discharge. Pointing out that Section 122.21 requires any person who "discharges or proposes to discharge pollutants" to file a permit application, Respondent alleges that it never proposed to discharge pollutants from its construction site.

Finally, Respondent requests that the attorney fees expended in responding to the "frivolous" Motion for Leave be deducted from the final penalty amount.

In its Reply, Complainant asserts that Respondent has not shown any prejudice that could result from the proposed amendment to the Complaint. Complainant asserts that the addition of the references to Section 308 and 40 C.F.R. § 122.21 does not create a new theory, claim or cause of action, and that no new documents or witnesses or testimony will be presented at the hearing. Complainant states that Respondent should need no more than a day or two to file an answer to the Amended Complaint.

III. Discussion and Conclusion on Motion for Leave to File Motion to Amend

On the one hand, Respondent seems to have missed the fact that Complainant's Motion to Amend was attached to its Motion for Leave, in conformity with the common practice of attaching the substantive motion to a motion for leave to file. On the other hand, Respondent sets forth arguments in its Opposition that are relevant to, and fully address, a motion to amend a complaint. Thus, there is no reason to allow further briefing on the Motion to Amend.

The Motion to Amend was filed after the pre-hearing motions deadline of December 15, 2005. When a party intends to file a motion after a deadline, the normal procedure is to submit a motion for leave to file out of time stating the reason for missing the deadline along with the substantive motion. Complainant's reason for filing the Motion to Amend, namely the ruling in the Order of March 7, 2006, did not arise until well after the motions' deadline. While Complainant may have been aware at the time it issued the Complaint that Section 308 of the CWA could constitute another statutory basis for the allegations therein, its failure to cite to it and its reliance instead on Sections 301 and 402 of the CWA has not been shown to be unreasonable, as Complainant expects to establish that a discharge in fact occurred during the relevant time period. As more fully discussed below, this is not a case where Complainant has failed to state a claim on which relief could be granted and then tries to save its pleading from

dismissal on the eve of trial by asserting a different claim. Therefore, the Motion for Leave will be **granted.**

IV. General Standards for Motion to Amend a Complaint

As to the Motion to Amend, no standard is provided in the Rules for determining whether to grant an amendment. The general rule is that administrative pleadings are "liberally construed and easily amended." *Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170, 205 (EAB 1992)(quoting *Yaffe Iron & Metal Co., Inc. v. U.S. EPA*, 774 F.2d 1008, 1012 (10th Cir. 1985)). They are analyzed under the standard applied in Federal court for amendment of pleadings: "[i]n the absence of ... undue delay, bad faith or dilatory motive on the part of the movant ... undue prejudice to the opposing party ... [or] futility of amendment," leave to amend pleadings should be allowed. *Foman v. Davis*, 371 U.S. 178, 181-182 (1962). As stated by the Supreme Court, "The Federal Rules [of Civil Procedure] reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

A proposed amendment is futile if it could not withstand a motion to dismiss. *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139, 168 (2nd Cir. 2003); *Hall v. United Insurance Co. of America*, 367 F.3d 1255, 1263 (11th Cir. 2004).

V. Discussion and Conclusions on Motion to Amend Complaint

In this proceeding, the original Complaint alleges in Count 1 (at ¶ 40), and Respondent admits in its Answer and stipulates (Stipulations, ¶ 35), that:

> The Respondent's failure to obtain a NDPDES permit on or before the date of commencement of construction activities at its facility and everyday thereafter until a permit is in place is a violation of sections 301(a) and 402(p) of the Act, 33 U.S.C. §§ 1311(a) and 1342(p) and 40 C.F.R. § 122.26.

The only difference between the Complaint and the Amended Complaint is that the latter includes a paragraph setting forth the requirement of Section 308(a)of the CWA, and amends the last phrase of Paragraph 40 (renumbered Paragraph 41) to read ". . . a violation of sections 301(a), 308 and 402(p) of the Act, 33 U.S.C. §§ 1311(a), 1318 and 1342(p) and 40 C.F.R. §§ 122.21 and 122.26." Essentially, the Motion to Amend seeks to add another statutory authority for liability under Section 309(g) of the CWA, and another regulatory authority for liability, under the same set of facts.

However, the Motion to Amend was filed three months after the pre-hearing motions deadline and six weeks prior to the scheduled evidentiary hearing. Complainant explained its

delay by stating that its Motion to Amend is based on the March 7, 2006 Accelerated Decision Order. Because it was filed in response to the ruling in the March 7th Order, there does not appear to be any bad faith or dilatory motive on the part of Complainant.

Given the fact that an EPA guidance document, the "2000 Storm Water Enforcement Strategy Update," indicates that Section 308 of the CWA is a basis for liability for failure to apply for a permit, arguably Complainant should have known to include a citation to Section 308 when it issued the original Complaint. However, Section 308 was not the only appropriate basis for liability; Complainant reasonably relied on Section 301(a), which is still at issue as a basis for alleging Respondent's liability in Count 1. Especially since Respondent admitted and stipulated to a violation of Count 1, Complainant may not have seen the need for adding a citation to Section 308 until at least the date Respondent submitted its opposition to Complainant's Motion for Accelerated Decision, submitted January 5, 2006, wherein Respondent contested liability on grounds that Complainant had not proven that a "discharge" occurred during the time period at issue. Therefore, there was no undue delay on the part of Complainant.

Respondent does not provide support for its arguments that it will be prejudiced by an amendment on the eve of trial that would deprive Respondent of its defense to liability and the penalty as to Count 1, and of a dismissal of the 308 allegation by accelerated decision, and would require it to prepare new defenses. Respondent does not dispute that its alleged "failure to obtain a NDPDES permit on or before the date of commencement of construction activities at its facility . . . until a permit is in place" is a violation of *some* relevant provision, as it acknowledges that it "did not get a permit when it was supposed to" and "[t]he only issue in this case is the penalty." Opposition at 8. Respondent does not dispute that it is liable for violating 40 C.F.R. § 122.26. Indeed, as stated in the March 7 Order (slip op. at 8), there is no dispute that Section 122.26© required Respondent to apply for a permit and that Respondent failed to do so, as "Subparagraphs of Section 122.26© . . . clearly indicate that the 'dischargers of stormwater' required to apply for a permit include persons who have not yet discharged stormwater." [3]

Therefore, Complainant has established Respondent's violation of 40 C.F.R. § 122.26, but has yet to establish that this violation constitutes a basis for a penalty under CWA § 309(g). Section 301(a) is a viable basis if Complainant can prove that a "discharge" occurred from Respondent's facility during the period in which it did not have a permit. A basis for liability

[3] The March 7th Order cites, *inter alia*, 40 C.F.R. § 122.26(c)(1)(i)(G)("Operators of new sources or new discharges (as defined in § 122.2 of this part) which are composed in part or entirely of storm water must include estimates for the pollutants or parameters"); § 122.2 (terms "new discharger" and "new source" defined as any building, structure, facility, or installation from which there is or may be a "discharge of pollutants"); § 122.26(c)(1)(ii) ("An operator of an existing or new storm water discharge that is associated with industrial activity solely under (b)(14)(x) of this section . . . is exempt from the requirements of § 122.21(g)").

under Section 308 involves the same set of facts, except that it would not require proof of an actual discharge. Thus there is no need for the parties to produce or discover any additional evidence as to CWA Section 308 or 40 C.F.R. § 122.21, or for Respondent to prepare any additional defenses.

The Court of Appeals for the District of Columbia Circuit has held that where no new *factual* allegations are sought, but the amendment "would do no more than clarify legal theories or make technical corrections . . . delay, without a showing of prejudice, is not a sufficient ground for denying the motion." *Harrison v. Rubin*, 174 F.3d 249 (D.C. Cir. 1999)(motion to amend complaint, submitted two years after complaint was filed, should be granted to substitute the citation to the Rehabilitation Act for the Americans with Disabilities Act, where no new factual allegations were added and no prejudice found, considering claims and defenses under the two statutes are virtually identical). The D.C. Circuit explained, "the crux of 'the liberal concepts of notice pleading embodied in the Federal Rules' is to make the defendant aware of the facts" and "'[u]nless a defendant is prejudiced on the merits by a change in legal theory . . .a plaintiff is not bound by the legal theory on which he or she originally relied.'" *Id.*(quoting, *Hanson v. Hoffmann*, 628 F.2d 42, 53, n. 11 (D.C. Cir. 1980).

As to prejudice, Federal courts have found no prejudice, and allowed amendment of a complaint to allege an additional theory of liability or claim where it is based on the same set of facts or substantially similar facts known or available to all parties. *Popp Telcom v. American Sharecom, Inc.*, 210 F.3d 928, 943 (8th Cir. 2000)(amendment of complaint should have been granted to include claims under state law for receiving stolen property and civil liability for theft, where based on the same set of facts as common law fraud and RICO claims); *Buder v. Merrill Lynch, Pierce, Fenner & Smith*, 644 F.2d 690, 694 (8th Cir. 1981)(complaint should be amended where facts underlying plaintiff's 10b-5 securities claim were substantially similar to those which form basis of common law fraud claim); *Lazuran v. Kemp*, 142 F.R.D. 466, 469 (W.D. Wash. 1991)(complaint alleging discrimination on basis of race and sex was amended to allege discrimination based on national origin, as the claims were reasonably related). On the other hand, undue prejudice was found upon a motion to amend a complaint to add new bases for liability where the case was pending for two years, plaintiffs did not explain their delay, additional discovery would be needed, and defendants asserted the amendments would take time away from other obligations in the case, including trial preparation. *Stewart v. FBI*, Civil No. 97-1595-ST, 1999 U.S. Dist. LEXIS 16844 (D. Or., Oct. 12, 1999).

Applying this precedent to the present case, the same set of facts support liability under both Section 301(a) and 308, and thus Respondent should not suffer prejudice from the proposed amendment. Respondent's argument that it would be prejudiced by not having an opportunity to file a motion for accelerated decision dismissing a claim under CWA § 308 loses its force considering that such dismissal would not resolve the issue of liability under Section 301(a), which remains at issue for the hearing. Moreover, if the Motion to Amend were denied now, then after the hearing the complaint could be amended to conform it to the proof, adding a citation to CWA § 308. Complaints can be amended to conform to proof as long as the issue sought to be amended was fairly litigated and there is no "undue surprise" or prejudice to the a

party. *H.E.L.P.E.R., Inc.*, 8 E.A.D. 437, 450-51 (EAB 1999)(complaint deemed implicitly amended to conform to evidence presented at hearing); *Wego Chemical & Mineral Corp.*, 4 E.A.D. 513, 525 (EAB 1993)(complaint amended to conform to proof where complaint contained typographical error in citation of regulation); *Yaffe Iron & Metal Co.*, 1 E.A.D. 719, 722 (J.O. 1982)(when pleadings vary from issues actually litigated, the pleadings may be amended to conform to proof so long as there is no undue surprise), *aff'd and remanded on other grounds*, 774 F.2d 1008 (10th Cir. 1985). There would be no undue surprise, prejudice, or question of whether the Section 308 issue was fairly litigated, as there are no additional facts to prove as to Section 308 or 40 C.F.R. § 122.21.

As to Respondent's argument that the proposed amendment is futile, the question is whether the assertion of liability under Section 308 for failure to apply for a permit is subject to dismissal. A claim may be dismissed under 40 C.F.R. § 22.20 "on the basis of failure to establish a prima facie case or other grounds that show no right to relief on the part of the complainant." To show that the proposed amendment is futile, Respondent must show that Complainant has failed to state a claim under Section 308 upon the facts stated in the Complaint.

Section 308 of the CWA states, in pertinent part, "Whenever required to carry out the objective of this chapter, including . . . carrying out section[] . . . [402] . . . the Administrator shall require the owner or operator of any point source to . . . provide such other information as he may reasonably require . . . ." The Administrator, through promulgation of the regulation at 40 C.F.R. § 122.26©, requires owners or operators of point sources who discharge stormwater to submit a permit application, which involves submittal to the EPA Administrator (or his delegatee) of certain detailed information. There is nothing in Section 308 which indicates that a specific request must be received from EPA for information, and that the Administrator cannot "require" the information through a regulation. Certainly the allegation that Respondent failed to submit an application for a NPDES permit states a colorable claim of a violation of Section 308 of the CWA. It is not necessary to resort to the EPA guidance document for an interpretation of Section 308.

Respondent's argument that the additional citation to 40 C.F.R. § 122.21 is futile because Section 122.21 requires an actual discharge or proposal to discharge pollutants, and Respondent did not propose to discharge pollutants, also fails. There is no need to prove an actual discharge or to prove that the person in fact proposed to discharge pollutants. The requirement in Section 122.21(a) for "Any person who . . .proposes to discharge" to submit an application is clarified by 40 C.F.R. § 122.21©, which states that "Facilities described under § 122.26(b)(14)(x) . . .shall submit applications at least 90 days before the date on which construction is to commence."[4]

It is concluded that the proposed amendment is not futile, is not the result of undue delay,

[4] Section 122.26(b)(x) defines "storm water associated with industrial activity" as including construction activity, which is the activity at issue in this proceeding.

and will not result in undue prejudice to the Respondent. Accordingly, the Motion to Amend is **granted**.

Respondent did not provide citations to any supporting authority for its request that the penalty to be reduced by the amount of attorney fees it expended on defending the Motion for Leave. Moreover, at this point in the proceeding it is premature to rule on any aspect of the assessment of the penalty. Therefore Respondent's request for the penalty to be reduced is **denied as premature**.

The Amended Complaint attached to the Motion to Amend has already been fully executed and filed on March 13, 2006. Normally, an amended complaint attached to a motion to amend is deemed a *proposed* amended complaint, because the complaint is not in fact amended until a motion to amend the complaint is granted. 40 C.F.R. Section 22.14(c)("the complainant may amend the complaint only upon motion granted by the Presiding Officer"). Thereafter, the complainant files and serves the amended complaint on the respondent, who must be given ample time, after notice that the complaint has in fact been amended, to answer the complaint. Thus, the Rules provide twenty days after service of the amended complaint for the respondent to file its answer. *Id.*

Here, however, there is no need for Respondent to file an answer to the Amended Complaint. The factual allegations have not been changed from the original Complaint. Respondent has already admitted Paragraph 40 of the original Complaint, which includes a legal conclusion (with which Respondent has argued it does not agree) that Respondent's failure to apply for a permit "is a violation of section[] 301(a)." Respondent is not required to answer legal conclusions listed in a complaint. 40 C.F.R. § 22.15(b) ("The answer shall clearly and directly admit, deny or explain each of the *factual* allegations contained in the complaint . . . ." (emphasis added)). Therefore, if Respondent also does not agree with the legal conclusion that its failure to apply for a permit is a violation of Section 308, there is no reason to require Respondent to respond to such legal conclusion in an answer. Respondent may argue in a post-hearing brief its position as to the issue of whether it is liable under Sections 301(a) and/or 308 of the CWA.

Accordingly, and considering that the hearing is scheduled to commence in a couple of weeks, the Amended Complaint is deemed to have been filed and served on the date of this Order, and Respondent's Answer to the original Complaint shall be deemed the Answer to the Amended Complaint.

ORDER

1. Complainant's Motion for Leave to File Motion to Amend Penalty Complaint is **GRANTED.**

2. Complainant's Motion to Amend Penalty Complaint is **GRANTED.**

3. The parties shall continue in good faith to negotiate a settlement of this matter.

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Susan L. Biro
Chief Administrative Law Judge

Dated: April 10, 2006
Washington, D.C.